2. Upon appeal to the Commission by counsel supporting the complaint, the Commission on May 27, 1958, with former Chairman Gwynne dissenting, held that a prima facie case in support of the complaint had been established, and issued its order vacating the initial decision and remanding the case to the hearing examiner for further proceedings. Since the remand, numerous hearings have been held and a large volume of evidence, both oral and documentary, introduced by respondent. Certain rebuttal evidence in support of the complaint has also been introduced. Proposed findings and conclusions have been submitted, together with supporting briefs. Oral argument has been waived, and the case is now before the hearing examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected.

3. Respondent is the largest manufacturer and seller of tapered roller bearings in the United States. It sells such bearings to manufacturers of automobiles, tractors and other machinery for use as original equipment, and it also sells large quantities of bearings to independent distributors and jobbers who resell them to automotive parts dealers, repair shops and industrial plants. The latter bearings are used for replacement and repair purposes in automobiles and other machines. This phase of respondent's business is in what is known as the replacement market and is the only phase involved in the present proceeding. The proceeding has no relation to sales of bearings for use as original equipment.

4. In the replacement market, respondent sells to two general classes of customers, whom it designates as authorized distributors and authorized jobbers. The distinction between the two, speaking generally, is that the distributor usually carries a larger and

more complete stock of bearings and deals with respondent direct; whereas the jobber carries a more restricted stock and obtains his bearings from an authorized distributor rather than from respondent direct. The distributors and jobbers pay the same price for the bearings; however, on all sales made by distributors to jobbers the distributor is given a specified credit by respondent.

The maintenance of a large inventory of tapered roller bearings requires a very substantial amount of capital, and a dealer may find it to his advantage to act as a jobber only, carrying a smaller stock and replenishing it from time to time by purchasing from an authorized distributor. Not infrequently a jobber, for reasons of his own, will wish to become a distributor, and similarly distributors sometimes prefer to relinquish that status and act as jobbers only. Respondent's distributors and jobbers' number some seven thousand, being divided about equally as between distributors and jobbers.

5. Subject to certain qualifications to be noted later, dealers in tapered roller bearings for replacement purposes usually are inclined to handle only one line or brand of such bearings. This is so because tapered roller bearings made by the various manufacturers are interchangeable in any particular size and type. In fact, the various manufacturers use the same numbering system. Thus an automobile bearing made by one manufacturer which wears out or proves defective may be replaced by a bearing of the same number made by another manufacturer. The stocking by a dealer of more than one line of tapered roller bearings would therefore increase his investment without affording him any appreciable benefit.

6. Respondent enters into written contracts with both its distributors and its jobbers, and copies of

such contracts appear in the record. Examination of these contracts discloses nothing which can reasonably be construed as an exclusive-dealing requirement. If there is a case in support of the complaint it must be found in other documents in the record, particularly intra-company correspondence between respondent and its sales personnel, and certain intra-company reports evidencing cancellation by respondent of contracts with distributors and jobbers.

7. Very little of the correspondence has any real probative value on the issue of exclusive dealing. Most of it consists of routine, day-to-day reports or memoranda such as would ordinarily be sent in by sales representatives to their employer, supplying information as to sales efforts, activities of competitors, etc. While some of the correspondence, considered alone, would indicate exclusive-dealing arrangements between respondent and certain customers, the probative value of the communications is materially weakened as a result of testimony giving the circumstances under which the correspondence took place. At best the documents represent only a relatively small number of isolated instances; they are wholly insufficient to establish a general policy of exclusive dealing on the part of respondent.

8. Any probative value which the cancellation reports might originally have had has been destroyed as a result of evidence received since the remand. Under respondent's routine procedure, when the contract of a distributor or jobber is cancelled for any reason, a report of the cancellation is prepared for intra-company information and use. The record contains some 113 such reports. The report form includes a question reading: "Why is this account being cancelled?", and in many of the reports this question is followed by such answers as "Took on Bower", "Have taken on

Bower through Federal-Mogul", "Buying Bower", "Taken on ABC line", and "Handling Hoover and ABC". It is these statements which are relied upon by Commission counsel to show the maintenance by respondent of an exclusive-dealing policy.

9. The record now establishes beyond question that in every instance evidenced by the cancellation reports the initiative in severing the relationship was taken by the customer rather than by respondent. In every instance the customer had either (1) made no purchases whatever, or practically none, for months, even years, immediately preceding the cancellation; or (2) had informed respondent through its sales representatives that he had decided to take on a competitive line and discontinue the Timken line. In short, Timken did not quit the customers; the customers quit Timken.

10. A variety of reasons were assigned by the distributors and jobbers for electing to handle another line. A number were impressed by the fact that Federal-Mogul-Bower, one of respondent's principal competitors, maintains some 81 warehouses in most of the principal cities in the United States, and that purchasers can supply most of their needs from these warehouses and thus obviate the necessity of carrying a large inventory. Others were motivated by personal reasons. Probably the principal reason, so far as jobber customers were concerned, was that until a few years ago Timken sold to authorized distributors at a lower price (or a larger discount) than to authorized jobbers. Consequently jobbers, unless they could obtain distributor status, were frequently inclined to seek other sources of supply.

11. Among the witnesses testifying on behalf of respondent were the present and former General Managers of its Service and Sales Division, all of the

Branch Managers of its seventeen branch offices, and some twenty salesmen. All testified unequivocally that Timken has no policy requiring exclusive dealing on the part of its distributors and jobbers; that all the company expects of its distributors and jobbers is that in promoting the sale of tapered roller bearings they will devote their primary or principal sales efforts to the Timken line; that as a matter of fact the majority of Timken distributors and jobbers do handle competing bearings without any interference on the part of Timken.

While, as already stated, bearing dealers usually are inclined to handle only one line, there frequently are occasions when for various reasons they will handle a relatively small number of other bearings. They may have customers who prefer a different brand; or there may be a delay in obtaining bearings in their primary line; or, after changing to a new line, they may have bearings left over from the original line; or they may be exceptions to the general rule and may prefer to stock more than one line.

In appraising the probative value of the testimony of Timken executives and salesmen there should, of course, be taken into account the fact that they have an interest in the proceeding. This fact, however, affords no reason for rejecting the testimony. On the contrary, the hearing examiner was impressed with the character and demeanor of the witnesses; he believes their testimony.

12. Also testifying on behalf of respondent were some thirty-seven Timken distributors and jobbers, widely scattered throughout the United States. In substance their testimony was that while Timken was their primary line they frequently handled competing bearings and felt entirely free to do so; that no threats of cancellation had ever been made by Tim-

ken, nor any other interference attempted. Here again the examiner was impressed with the witnesses and believes their testimony.

13. Among the reasons given by the witnesses for preferring the Timken line were the high quality of the products, the completeness of the line, and the fact that the line is well known and has high consumer acceptance.

14. The only distributor or jobber witness giving testimony adverse to respondent was Peter Pakulak, a former jobber of Timken in San Francisco, California, who, with a co-partner, operates a bearing business under the name Bearing Distributing Company. Pakulak was offered by Commission counsel as a rebuttal witness, his testimony, by agreement of counsel, being taken during the course of respondent's case.

Pakulak testified that he had been an authorized Timken jobber for several years immediately preceding April 1951. While he had also sold Bower bearings from time to time, he had never stocked them but apparently obtained them from the Bower local warehouse as needed. In April 1951, he, along with several other bearing dealers, filed bids with the City of San Francisco on a quantity of bearings which the city desired to purchase. Pakulak filed bids on both Timken and Bower bearings, the two bids being identical. In fact, the bids of all bidders were identical, and in such a situation it was the practice of the city to award the contract by lot; specifically, by letting the bidders draw numbered balls from a receptacle. As a result of the drawing, Pakulak was awarded the contract on the Bower bearings, but not on the Timken bearings.

Pakulak testified further that about ten days after he was awarded the contract on the Bower bearings,

William G. Turner, Branch Manager of Timken's San Francisco branch, called on him, that there was a conversation between the two regarding the Bower bid and that during the course of the conversation Turner called Pakulak and his partner "Chiseling Bums." Turner in his own testimony denied using this language. Further testimony of Pakulak was that a few days after the conversation his contract with Timken was cancelled, and that he attributed the cancellation to his bid on the Bower bearings.

According to a written statement prepared by Pakulak, his purchases of Timken bearings amounted to $8,595.96 in 1948; $6,768.24 in 1949; $5,910.62 in 1950; and $2,193.96 during the period in 1951 before his contract was cancelled.

Subsequent to the cancellation, Pakulak brought suit against Timken and certain other parties for damages. It appears, however, that the suit was not based on the cancellation, but charged a price-fixing combination among Timken and the other defendants. The present record does not disclose the outcome of that litigation.

15. Turner's version of the incident was that he called on Pakulak because it seemed strange to him that Pakulak, who was representing himself as an authorized jobber of Timken bearings and who, according to Turner's information, was not representing Bower, should nevertheless make a bid on Bower bearings; that Pakulak's contract was not cancelled because of the Bower bid, but because Pakulak was regarded as an unsatisfactory jobber; that the volume of business done by him in Timken bearings was insufficient; that he did not maintain an adequate stock of Timken bearings as provided in his contract; and that in these circumstances it was not fair to other Timken jobbers and distributors in that area to con-

tinue Pakulak as a jobber, when the other jobbers and distributors were carrying out their contractual obligations to maintain adequate inventories.

16. Assuming for present purposes that Pakulak's version is correct and that the cancellation was due to the Bower bid, the incident would appear to represent at most only a single, isolated instance, and to have no significant probative value on the question whether Timken maintains a policy of exclusive dealing.

17. In calling on Timken distributors and jobbers, respondent's salesmen frequently check their stock, and Commission counsel urge that this constitutes policing of the dealers and indicates the maintenance by respondent of a policy of exclusive dealing. The record affords no basis for such an inference. There are several reasons why Timken may properly be interested in the stocks of its dealers. In the first place, the dealers' contracts provide that they shall maintain adequate inventories. Also, Timken has an "obsolescence" policy under which its distributors and jobbers may return and receive credit for a specified percentage of old and unsold bearings. Timken salesmen can be of material assistance to the dealer in identifying such bearings. Finally, it must be remembered that the primary purpose of the salesman's call is to sell bearings. By checking the stock, he can bring to the dealer's attention gaps and shortages in the stock and thereby possibly obtain an order.

No instance is disclosed in which any distributor or jobber has complained of the practice. On the contrary the practice would appear to be of substantial benefit to the dealers.

18. In the consideration of cases charging violation of Section 3 of the Clayton Act, certain fundamental principles must constantly be kept in mind. The first is that there is a clear distinction between, on the one

hand, the selling of goods on the condition proscribed by the statute and, on the other hand, the right of a seller to push his own goods and, if he can, to induce or persuade purchasers to handle his goods exclusively. In no sense is the latter a violation of law.

19. But even more important and fundamental is the principle that a seller has the right to select his own customers—to sell or to decline to sell as he chooses. Just as a buyer may cease buying from a seller at any time and for any reason, so a seller has the right to discontinue selling to a customer at any time and for any reason, including the reason that the customer is handling a competing line of goods. The only requirement of the statute is that if the seller does elect to sell or to continue to sell, the transaction must not be "on the condition, agreement, or understanding" that the customer will not deal in the goods of a competitor. Evidence of instances of discontinuance of selling is received in a proceeding of this kind, not because the discontinuance is in itself illegal, but solely because such evidence may assist in resolving the question whether the seller is maintaining a policy of selling on the condition forbidden by the statute.

20. Clearly in the present case the record wholly fails to establish the existence of such a policy.

21. The conclusion reached upon this issue renders unnecessary any consideration of other issues.

CONCLUSION

The complaint has not been sustained.

ORDER

IT IS ORDERED that the complaint be, and it hereby is, dismissed.

WILLIAM L. PACK,
Hearing Examiner.

MARCH 18, 1960.

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